

69-2500-8782-2
MPUC IP-1/CN-94-004

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Application
by LSP-Cottage Grove, L.P. for a
Certificate of Need for a Large
Generating Facility

ORDER ON PETITIONS
TO INTERVENE

Petitions to Intervene were filed in this matter on May 5, 1994, by Genoa Generating Limited Partnership (Genoa) and on May 11, 1994, by Minnesota Power and Light Company (Minnesota Power). Pursuant to the Prehearing Order issued on May 23, 1994, in this matter, briefing was allowed on those Petitions to Intervene. The Minnesota Department of Public Service (DPS) and LSP-Cottage Grove, L.P. (LSP), have filed briefs in opposition to those Petitions to Intervene.

The deadline for petitions to intervene in this matter was May 16, 1994. The City of St. Paul (St. Paul) filed a Petition to Intervene on June 6, 1994. The record on the Petitions for Intervention closed on June 7, 1994, upon the receipt of the final memorandum.

Jeffrey L. Landsman, Wheeler, Van Sickle & Anderson, Suite 801, 25 West Main Street, Madison, Wisconsin 53703-3398, represents Genoa. David J. McMillan, Attorney, 30 West Superior Street, Duluth, Minnesota 55802, represents Minnesota Power. Thomas J. Weyandt, Assistant City Attorney, 400 City Hall, 15 West Kellogg Boulevard, St. Paul, Minnesota 55102, represents St. Paul. Charles K. Dayton, Leonard, Street and Deinard, Suite 2300, 150 South Fifth Street, Minneapolis, Minnesota 55402, represents LSP. Michael A. Simon, Assistant Attorney General, Suite 1200, NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, represents DPS.

Based upon the filings and memoranda of the participants in this matter and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following determinations:

1. The Petition to Intervene of Genoa is DENIED, however, Genoa is granted limited participation status to prefile testimony and argument.

2. The Petition to Intervene of Minnesota Power is DENIED, however, Minnesota Power is granted limited participation status to prefile testimony and argument.
3. The Petition to Intervene of St. Paul is DENIED.
4. The prefiled testimony of Genoa and Minnesota Power is subject to cross-examination by any party to this matter. The limited participation status granted Genoa and Minnesota Power does not confer the right to cross-examine other witnesses. Prefiled testimony is to be filed by July 8, 1994. Argument shall be submitted upon a schedule to be determined at the hearing.

IT IS SO ORDERED.

Dated this ____ day of June, 1994.

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

Applicable Standard for Granting Intervention

The rules adopted by the Office of Administrative Hearings (OAH) include standards for assessing petitions for intervention. Procedural rules of the Office of Administrative Hearings supersede other agency rules with which they conflict. Minn. Stat. § 14.51. The Administrative Law Judge is required to consider whether the applicant's "legal rights, duties, or privileges" could be affected, whether the applicant may be "directly affected," or whether the applicant's participation is authorized by statute, rule, or court order. Minn. Rule 1400.6200, subp. 1. Two rules setting standards for intervention matters before the Public Utilities Commission (PUC) exist. One rule applies only to certificate of need proceedings for large energy facilities and the other rule applies to matters generally before the PUC.

Subpart 1 of Minn. Rule 7847.0130 allows intervention by "any federal, state, or local agency with authority to grant permits of certificate of siting, construction, or operation of large energy facilities" Intervention by such an agency is by right, with only notice to the other

parties required. The notice must contain a statement of the agency's jurisdiction. Minn. Rule 7847.0130, subp. 1(A).

Subpart 2 of Minn. Rule 7847.0130 allows for a petition to intervene by a person claiming an interest in the proposed facility. The intervention petition must be granted by the administrative law judge if:

... the petitioner may be materially affected by the outcome of the proceedings, or the intervention of the petitioner will materially advance the consideration of the application.

Minn. Rule 7847.0130, subp. 4.

Intervention in matters before the PUC generally is governed by Minn. Rule 7830.2200. Under that rule, the interest of the petitioner to intervene must be "reasonably pertinent to the issues involved in the principal pleadings and shall not unduly broaden the issues." Minn. Rule 7830.2200.

Harmonizing the various rules on intervention to the greatest extent possible, it appears that the petitions to intervene in this matter should meet the specific standards in Minn. Rule 7847.0130 that apply when intervention is sought in a certificate of need application, with the sole exception of the standard the petitioner must demonstrate meet in showing how it is affected. Rather than "materially affected" as required by the PUC rules, the proper standard is "directly affected" as required by Minn. Rule 1400.6200, subp. 1. Where the directly affected standard is met, the intervention petition shall be granted, unless the administrative law judge determines that the interest asserted is adequately represented by another party participating in the matter. Minn. Rule 1400.6200, subp. 3.

Intervention by Right

St. Paul

St. Paul filed a Petition to Intervene as of right under Minn. Rule 7847.0130, subp. 1. St. Paul's Petition was filed after the deadline and could be denied on that basis alone. Further, the jurisdiction alleged in that Petition is as follows:

Prior to 1975 the City of St. Paul regulated and issued a franchise to Northern States Power Company, and thus the City of St. Paul is entitled to participate in this case as an Amicus pursuant to Minn. Stat. 216B.22. It is the opinion of the Petitioner that this case may have an impact on the franchise the City has issued to Northern States Power.

Minn. Stat. § 216B.22 authorizes any municipality controlling a utility franchise to participate as an amicus "with respect to the rates, fares, prices, regulation or control of any utility operating therein." Both Minn. Rule 7847.0130, subp. 1, and Minn. Stat. § 216B.22 limit participation of municipalities by right to proceedings regarding utilities within their boundaries.

In its letter memorandum, St. Paul states that "clearly the matter before you involves the regulation or control of NSP's operations." That is not correct. NSP is not a party to this matter and the outcome of this matter will have no effect on NSP's operations. LSP is to be located in Cottage Grove, not St. Paul. NSP may well purchase the electrical output from the new plant, but this does not extend St. Paul's jurisdiction to Cottage Grove. purchase of electricity by NSP does not confer intervention rights on a municipality in a proceeding by a different utility outside the municipality.

boundaries. St. Paul does not meet the standards for intervention as of right. St. Paul has not attempted to show it is materially affected by this proceeding and thus could meet the other standards for intervention. The Petition for Intervention by St. Paul must be denied.

Meeting the Intervenor Standards

Genoa

Genoa claims to be directly affected by the proposed energy facility under consideration in this Certificate of Need proceeding. In its Petition, Genoa states:

6. The Genoa Energy Project is an alternative to the facility proposed by LSP-Cottage Grove, L.P., for satisfying the energy demand, and Genoa seeks to intervene in this proceeding for the purpose of supporting the Genoa Energy Project as an alternative. 7. Unless alternatives to the facility proposed by LSP-Cottage Grove L.P., such as the Genoa Energy Project, are fully evaluated and considered, NSP ratepayers may lose the benefits of such alternatives.

Genoa Petition to Intervene, at 2.

Minnesota Power

In its Petition to Intervene, Minnesota Power states that "it has alternatives to the facility proposed by LSP." Minnesota Power Petition to Intervene, at 2. Minnesota Power also states that "the best interests of ratepayers in the state require that all such alternatives be fully and fairly considered." Id.

Best Interests of Ratepayers

The standard for intervention requires that the petitioner be directly affected by the outcome of the proceedings. As pointed out by DPS, neither Minnesota Power nor Genoa are ratepayers. DPS Memorandum, at 3-4. Further, DPS argues that the interests of ratepayers are represented adequately by DPS and OAG. Id. at 4. Neither Petitioner has indicated how it is directly affected by the rates charged to NSP's customers. Minnesota Power and Genoa do not meet the intervention standard by asserting the interests of ratepayers.

Alternative Sources of Power

Both Genoa and Minnesota Power have asserted they are directly affected by this proceeding because they provide alternative sources of power to the

generating facility proposed by LSP. LSP argues that providing an alternative source of power does not constitute being "directly affected" for the purposes of intervention. DPS analogizes this situation to NSP seeking to build its generating facility. In such a case, DPS maintains, competitors would not be eligible to intervene. DPS Memorandum, at 5. No support is cited for this proposition, however.

Minnesota Power suggests that its obligation to its ratepayers is "to assure that [Minnesota Power's] rates remain as competitive as possible and that its assets are used in the most economically advantageous manner possible." Minnesota Power Memorandum, at 11. Genoa stated:

Clearly [Genoa's] interest will be materially and adversely affected if the Commission grants a certificate of need to LSP ... since such an action will effectively foreclose Genoa from contracting with NSP to supply some or all of its energy needs.

Genoa Memorandum, at 5-6 (emphasis in original).

Nothing in the certificate of need process precludes Minnesota Power or Genoa from selling its electricity to NSP or any other electric utility that wishes to purchase that electricity. In fact, NSP has contracted with LSP after a bidding process which included Genoa.¹ The certificate of need process is completely independent of the bidding process.

Genoa cites two cases as supporting intervention by competitors. Genoa Memorandum, at 8. In Twin Ports Convalescent, Inc. v. Minnesota State Board of Health, 257 N.W.2d 343 (Minn. 1977), a competing ambulance service sought judicial revocation of an ambulance license granted by the Minnesota Department of Health for failing to require a public hearing before granting the license. The Minnesota Supreme Court found that the competitor did have an "interest arguably among those intended to be protected by the statute." Twin Ports, N.W.2d at 346 (emphasis in original). This holding supported the competitor's standing to sue in district court.

Hearings are required in ambulance license proceedings to determine if need for the proposed service exists. Existing ambulance services are entitled to intervene to show that they are meeting the existing needs of the service area affected by the application. Ambulance service is specific to a defined geographic area. There is little opportunity for an ambulance service to obtain revenue outside its service area. If there is insufficient demand for additional ambulance service, the existing service may not be able to meet its own costs. In such an event, the service area could lose its existing ambulance. These facts distinguish Twin Ports and make it inapplicable here.

1/ Minnesota Power did not participate in that process. Minnesota Power Memorandum, at 3. Rainy River Energy Corporation (Rainy River) proposed a cogeneration project that would sell NSP electricity. Id. There is a connection between Rainy River and Minnesota Power, but they are separate entities. The energy Minnesota Power suggests it has available is not from Rainy River.

The other case cited by Genoa, ITT World Communications, Inc. v. FCC, F.2d 1219 (D.C.Cir. 1983), rev'd on other grounds, 466 U.S. 463 (1984), concerns the restriction of contacts between American telecommunications carriers and foreign carriers. The holding in ITT World Communications, quoted by Genoa, is that "ITT has standing to complain of ultra vires Commission actions that threaten it with competitive injury." Id. at 1231.

The competitive injury identified by Genoa and Minnesota Power is the possible lost opportunity for them to sell electricity to NSP with less competition. The existence of adequate electrical generating capacity is an issue in certificate of need applications. Minn. Stat. § 216B.243, subd. 3(7). However, having excess generating capacity does not amount to being directly affected (or materially affected) for two reasons. Firstly, NSP selected a competitor in the bidding process. Thus, no right exists for Minnesota Power or Genoa to sell electricity to NSP. Secondly, excess generating capacity is the responsibility of the utility that built that capacity. There is no right afforded a utility by virtue of its construction of capacity.

Neither Petitioner has identified any interest that will be directly affected by this process. Neither Petitioner has demonstrated that it meets the standards for becoming an intervenor. Nonetheless, Minnesota Power and Genoa have demonstrated they have unique interests not adequately represented regarding the availability of electricity to meet the need proposed in this matter. Further, Genoa and Minnesota Power have specialized knowledge that will be helpful in resolving this matter. Therefore, the Petitions to Intervene by Genoa and Minnesota Power are, therefore, DENIED as to full intervenor status. Those Petitions are GRANTED for the limited participation of Genoa and Minnesota Power on the issue of existing electrical generating capacity.

Other Grounds for Denying Intervention

Federal preemption, the principle of reading statutes in pari materia, the doctrine of the law of the case, and the inequity caused by delay are cited by LSP as reasons to deny the Petitions to Intervene by Genoa and Minnesota Power. Since the Petitions have been resolved on other grounds as set forth above, each argument will be discussed only briefly.

Federal Preemption

Under the Public Utilities Regulatory Policy Act of 1978, 16 U.S.C. § 801 et seq. (PURPA), a qualified facility is afforded certain rights regarding the sale of power to utilities. LSP is proposing to build a qualifying facility. The PUC required NSP to engage in a bidding process regarding power purchases from qualifying facilities and others. The PUC based its order requiring the

bidding process on PURPA and Minn. Stat. § 216B.164. LSP entered into a contract to sell electricity to NSP as a result of that bidding process.

LSP asserts that PURPA's encouragement of qualifying facilities preempts the participation of Minnesota Power and Genoa (neither of which are qualifying facilities) in the certificate of need process. There is no relation between the status afforded some generating facilities under PURPA

and the requirement that large generating facilities go through a certificate of need process. The existence of a contract obtained under PURPA does not eliminate the certificate of need process. The applicant must meet the requirements of Minn. Stat. § 216B.243 to construct its generating facility. PURPA does not preempt the certificate of need process.

In Pari Materia

The legal doctrine of in pari materia requires statutes relating to the same subject matter be construed as consistent with each other. Minneapolis Police Officers Federation v. City of Minneapolis, 481 N.W.2d 372, 374 (Minn. App. 1992). LSP maintains that, absent application of this doctrine, absurd results could occur. LSP Memorandum, at 8-9. The results cited are 1) LSP a contract to provide electricity, but cannot build its generating facility; Genoa could not obtain a contract to provide electricity through this process; and 3) Genoa would have to go through the certificate of need process if it were successful in defeating LSP's application for a certificate of need.

LSP has misconstrued the relation of PURPA and the certificate of need process. A certificate of need is required whenever a large generating facility is constructed to demonstrate the need for the facility and the propriety of building that type of facility. See In the Matter of an Independent Fuel Storage Installation, 501 N.W.2d 638, 648 (Minn.App. 1993) rev. denied July 15, 1993. PURPA establishes a preference for qualifying facilities for meeting power needs. Success in obtaining a contract to provide electricity to NSP does not eliminate LSP's obligation to demonstrate the standards set forth in Minn. Stat. § 216B.243. Since Genoa has existing electrical capacity and is in another jurisdiction, it is not required to go through the Minnesota certificate of need process. Similarly, since Minnesota Power has existing electrical capacity, there is no opportunity for invoking the certificate of need process.

As discussed above, PURPA and the certificate of need process address different issues in the electrical generation industry. There is no inconsistency between PURPA and Minn. Stat. § 216B.243 that would require the application of the in pari materia doctrine.

Law of the Case

Where issues in a case are resolved on a set of facts, the result becomes the law of the case and that result cannot be challenged on successive appeals. See Sigurdson v. Isanti County, 448 N.W.2d 62, 66 (Minn. 1989). LSP asserts the law of the case applies to the PUC's order requiring a bidding process and therefore, the results of that bidding process cannot be reviewed in this proceeding. As discussed in the foregoing paragraphs, there is no connection between the bidding process and this certificate of need process. The results of the bidding process are not being examined in this proceeding.

Rather, the standards in Minn. Stat. § 216B.243 are being applied to LSP's proposed generating facility.

There is no suggestion that the PUC intended to delegate authority to approve a new generating facility to NSP in its contract process. The facts which underlay the granting of a certificate of need were not established in

the bidding process. There is no basis for applying the law of the case doctrine in this matter.

Inequity of Delay

LSP asserts that granting the Petitions for Intervention will result in delay in the certificate of need process and, if the application is not granted, could result in new certificate of need applications by Genoa or Minnesota Power. If Genoa or Minnesota Power are to succeed in their challenges to LSP's application on the basis of existing alternatives, that electricity generating capacity already must exist. There will be no delay requiring a subsequent certificate of need process. Genoa and Minnesota Power have been granted limited participation status which will allow them to introduce evidence on the existing generating capacity available to NSP. The limited status granted Genoa and Minnesota Power will not result in delay. There is no inequity in allowing limited participation to Genoa and Minnesota Power.

Conclusion

None of the doctrines asserted by LSP are applicable to this matter. Petitioners have not met the standards for intervention, either by right or showing they are directly affected by the certificate of need process. Since the Petitioners have not met the statutory standards for intervention, their Petitions for Intervention must be DENIED. To ensure this matter proceeds expeditiously, however, Genoa and Minnesota Power are granted a limited participation status. This status allows them to file testimony on the issues they have raised. This status does not afford the Petitioners the right to engage in discovery or cross-examination.

S.M.M.